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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>AUSTIN RIOS,<br><br>Defendant and Appellant. | B189841<br><br>(Los Angeles County<br>Super. Ct. No. NA 063828) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary J. Ferrari, Judge. Modified in part with directions and affirmed in part.

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Katherine Eileen Greenebaum, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Robert F. Katz and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Austin Rios of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b); all further undesignated section references are to the Penal Code), shooting at an inhabited dwelling (§ 246), and possession of marijuana for sale (Health & Saf. Code, § 11359). The jury found, pursuant to section 12022, subdivision (a)(1), that at the time of the shooting Rios was armed with a firearm, and that, pursuant to section 186.22, subdivision (b)(1), the shooting was done for the benefit of a criminal street gang. The trial court denied Rios' motion for a new trial and, applying section 186.22, subdivision (b)(4)(B), sentenced him to 15 years to life for violating section 246, plus a consecutive one-year term pursuant to section 12022, subdivision (a)(1), and a concurrent 16-month term for possessing marijuana. The court stayed a concurrent six-year term for violation of section 245.

Rios appeals, contending that the trial court erred prejudicially by (1) answering a jury question during deliberations without consulting Rios' counsel; (2) failing to instruct the jury that the prosecution had violated discovery rules; (3) overruling Rios' hearsay objection to a statement contained in a report that Rios had admitted that he was a gang member; and (4) imposing a one-year sentence pursuant to section 12022. He also maintains that substantial evidence does not support his conviction for violation of section 246.

We agree with Rios that the court erred in imposing a one-year sentence under section 12022. We disagree with his other contentions.

## FACTS

At approximately 6:00 p.m. on October 9, 2004, teenager Ray S. (Ray), Martin G. (Martin), and a few other Samoan-Americans were standing outside the El Capitan condominium complex where they lived in Long Beach. A green Acura Integra sedan slowly drove by with four people inside, then made a U-turn, drove back, and stopped close to where Ray, Martin, and the others were standing. The car's occupants yelled, "Westside Longo," the name of a local Hispanic

criminal gang. Then a passenger in the car pulled out a pistol, pointed it toward the group, and began firing. Ray, Martin, and their companions ran into the complex through a security gate, closed the gate, and hid behind the complex's wall. Martin heard bullets hit the gate. He told a neighbor to call the police.

When Long Beach police officers arrived to investigate the reported shooting, they encountered five Samoan men standing outside the security gate, but all the men denied knowing of any shooting. The police found four freshly expended 9-millimeter cartridge casings in the street and fragments, holes, and indentations from bullets in and around the security gate. The location of the ejected casings relative to the bullet marks indicated that the gun had been held sideways, "gangster style."

The officers questioned residents of the El Capitan. Martin, who originally had refused to talk to police and, like others in the neighborhood, feared gang retaliation, later described what he had seen. He told officers that before the shooting he had seen the occupants of the same green car "mad dogging" around the El Capitan—making facial expressions intended to intimidate other gang members. Martin described the driver and the rear passenger who fired the shots. The police also interviewed Ray. Both Martin and Ray identified Rios' car, a green Acura with green tinted windows, to the police as the car involved in the shooting and identified Rios as the driver.[1] At trial, they repeated these identifications.

Two weeks later, on October 25, 2004, Loria C. (Loria) saw a green Acura parked near her house, two blocks from the El Capitan. The car drove away when a police car went by. She had seen that car in her neighborhood before, and whenever she was next to it, someone in it displayed the Westside Longo gang sign using hand gestures. Later that evening Loria saw the same car drive by her

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[1] Ray reported that the driver wore a baseball cap. When he was first interviewed, Martin did not mention a baseball cap or that the car had tinted windows.

house. It stopped, and someone in the car spoke to her nephew. The car then drove off, and Loria heard somebody in the car say, "Fuck you, nigger, Westside Longos." Almost half an hour later, Loria was in her house when she saw the same car drive by along with two other cars and heard five to seven gunshots, one of which went through her front window, over her mother's head, and into the living room wall. Loria called 911. She reported seeing three male Hispanics running away but did not get a good look at them or the cars' occupants. Police recovered several 9-millimeter cartridge casings from the front of Loria's house. Forensic analysis showed that the casings outside the El Capitan and those found outside Loria's home came from the same gun.

On October 29, 2004, when police knocked on the front door of the home of a known Westside Longos member during an unrelated investigation, Rios ran out the back door and tried to escape by climbing the fence. Police found Westside Longos gang writings in two bedrooms in the house and in a back shed, along with Raiders football memorabilia, items favored by gang members.

On December 12, 2004, gang detectives executed a search warrant at the house where Rios lived with his mother and two sisters. The officers observed Rios emerge from the garage, which appeared to be sleeping quarters furnished with bedding and a dresser. In the garage they found a bullet-proof vest, an item increasingly used by gangs, along with one 9-millimeter round, some cartridges of other calibers, and some ammunition clips for guns. Although no gun was found, a gang expert testified that gang members frequently store ammunition and guns in separate locations. The detectives also found 163 grams of marijuana together with a scale, baggies, and small denominations of cash, indicating possession of marijuana for sale. They found no gang paraphernalia in the house or garage.

On February 14, 2005, Rios was charged with assault with a semiautomatic firearm (§ 245, subd. (b)) and shooting at an inhabited dwelling (§ 246) for the benefit of a criminal street gang (§186.22) while armed with a firearm (§ 12022,

subd. (a)(1)). The information also charged Rios with possession of marijuana for sale. (Health & Saf. Code, § 11359.)

Rios' trial began on September 20, 2005. Ray and Martin both identified Rios as the driver of the car involved in the October 9, 2004 drive-by shooting at the El Capitan and identified Rios' green Acura Integra as the car from which the shots were fired. Ray was hesitant and uncomfortable on the stand; he and his family feared retaliation. Martin, who had since moved away from the area, was more comfortable and direct in identifying Rios and his car. Loria also identified the green Acura, but could not identify the driver or any passengers.

Detective Abel Morales (Morales), the principal investigator on this case, testified that he had been a Long Beach police officer for 13 years, a gang detective for more than 11 years, and had testified in court as a gang expert more than 50 times. He explained gang life and culture in general and the particular activities of the Westside Longo gang and the affiliated Westside Stoners gang, including the Hispanic gang members' ongoing friction with local Samoan, Filipino, and African-American gangs and residents. Morales opined that Rios was a member of the Westside Longos based on Rios' documented contacts with other known members, including the October 29, 2004 incident involving his attempted escape from the home of a known gang member; witnesses' statements that the driver of the green Acura threw Westside Longo gang signs; and "that he admitted to me at the . . . time of his arrest as being a member of the Westside Longos." On cross-examination, Morales testified that this admission was documented in a "Cal Gang piece of paper." Upon further questioning, however, he conceded that, at the preliminary hearing, he had testified only that he had heard from other officers that Rios had admitted gang membership. Examination of the document did not reveal any notation of an admission to Morales, but only that Rios had admitted membership to unnamed officers who were investigating a shooting not involved in this case. It is undisputed that the prosecution first provided the "Cal Gang" printout to the defense at the time of Morales' testimony.

Out of the jury's presence, the trial court stated that neither the arrest report, the crime report, nor the Cal Gang printout had any notation that Rios had admitted gang membership to Morales, and the only indication of such an admission came from a report regarding other police officers' separate investigation of another shooting incident, any mention of which the trial court had ruled would be excluded from this case.

In addition to the testimony of Rios' sister and cousin, the defense presented the testimony of Lonnie H. (Lonnie), who was dropping a friend off at the El Capitan at the time of the shooting. Lonnie testified that he saw the shooting, and that the shots were fired from either a green Acura or Infiniti. He telephoned the police and reported the incident. He also testified that he did not remember the car having custom wheels like Rios' Acura Integra, and he distinctly remembered that the car did not have tinted windows, unlike Rios' car, because he saw the car's occupants through the windows, who were all Asians. Although a police report stated that he identified all the car's occupants as male Hispanics, he testified that the police report was incorrect. On the tape recording of his call to police, however, he identified the assailants as four male Hispanics in a green Infiniti. He admitted that he did not speak with police at the scene for fear of gang retaliation, and that his friend's daughter, who also saw the shooting, had received threats about talking to the police regarding the incident.

In her closing argument, Rios' counsel pointed out discrepancies between various witnesses' statements regarding whether the car involved in the shooting had green tinted windows like Rios' car, whether the driver was wearing a baseball hat or not, and what sort of gun witnesses saw in the shooter's hand. She also argued that Detective Morales had perjured himself, quoted the instruction that a "witness who is willfully false in one material part of his or her testimony is to be distrusted in others," and encouraged the jury to reject all of Morales' testimony.

Defense counsel requested that the court instruct the jury on CALJIC No. 2.28 because the prosecution had failed to provide the Cal Gang printout until the middle of trial.[2] The court denied the request. After the jury withdrew to deliberate, the trial court stated, "With respect to readback, . . . what I normally do is with the concurrence of counsel, is if they should request something, [the court reporter] will prepare it, provide it to you so that you can see what's going to be read back and then she goes back in there [to the jury room] so we can conduct other court business. But your client should be advised that he has a right to be present at all proceedings and he would have to waive his presence." Defense counsel conferred with Rios, and Rios waived his presence at any readbacks.

The following day, the jury submitted two questions: "We would like to review testimony as to how the car was selected by the police to present to witnesses. Also, we would like to review testimony that makes any reference to how many different cars (if more than one) may have been presented to witnesses for identification." Although the transcript does not contain a stipulation regarding readback or a statement that counsel were informed of the jury's questions, the minute order states: "At 10:25 A.M., the jury submits written request for readback. Counsel are advised of the request and pursuant to stipulation of counsel, the court directs the court reporter to read back the requested testimony." About an hour after the court received the jury's questions, in open court, but in the absence of counsel and the defendant, the trial court told

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[2] Regarding a prosecutor's duty to timely disclose evidence, CALJIC No. 2.28 provides, in pertinent part: "The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of the truth, save court time and avoid any surprise which may arise during the course of the trial. [Concealment of evidence] [and] [or] [[D][d]elay in the disclosure of evidence] may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-complying party's evidence. [¶] . . . [¶] [If you find that the [concealment] [and] [or] [delayed disclosure] was by the prosecution, and relates to a fact of importance rather than something trivial, and does not relate to subject matter already established by other credible evidence, you may consider that [concealment] [and] [or] [delayed disclosure] in determining the [[believability] [or] [weight] to be given to that particular evidence[.] . . ."

the jury, "[W]hile there was testimony identifying this particular car, we could not find any testimony as to how the officer picked out the specific car, just that it was identified, they took pictures of the car and then they showed them to various people. [¶] But as far as there was any six-pack of cars, if that's what you're looking for, and she has . . . searched the database. [¶] So other than that, I can't answer that question any further than that." The jury foreperson responded, "That's an answer." After deliberating for 10 more minutes, the jury reached verdicts. Shortly thereafter, with jury, counsel and the defendant present, the clerk read and entered the verdicts.

Before the jury was dismissed, defense counsel stated her intention to bring motions for a new trial and for a mistrial. She also said: "I did get a call regarding whatever the jurors had a question as far as readback. I don't know what was read back to the jurors." The court answered, "I brought the jurors out and told them there was nothing in the testimony that indicated anything to that [e]ffect, so nothing was read back." Defense counsel said nothing further about readback, and the jury was dismissed.

At the sentencing hearing, defense counsel moved for a new trial based on the court's refusal to instruct the jury on CALJIC No. 2.28 and the court's alleged error in responding improperly to the jury's questions during deliberations, among other grounds. Counsel did not argue that she had not stipulated to readback in her absence or that she had not been informed of the content of the jury's questions. Rather, she argued that the court erred in failing to confer with counsel before determining that the testimony requested by the jurors did not exist: "The question was who showed the photographs of the green Acura to the witnesses? The defense was not given an opportunity to participate or respond to the question. If the jury had been reminded of the testimony that Detective Morales showed the photographs of the green Acura[,] [j]urors claimed they would not have come back with a guilty verdict. This certainly could have affected the jury's decision because when speaking with members of the jury after the guilty verdict, they

expressed that the verdict would have been different." The trial court denied the motion, noting that both in cross-examination and in her closing argument, defense counsel had thoroughly and effectively impeached Morales regarding the Cal Gang printout and his claim that Rios had admitted gang membership, and that no testimony existed on how the car was selected to present to witnesses to read back to the jury. The court sentenced Rios to 16 years to life. Rios timely appealed.

## DISCUSSION

### A.

Rios contends that the trial court committed prejudicial error when it answered the jury's questions without first consulting with his counsel. He maintains that had his counsel been able to clarify the questions, she might have been able to identify what information the jury really wanted—whether it was Detective Morales who had shown witnesses pictures of Rios' car for identification—and that this might have altered the outcome of the case.

In the absence of a stipulation to the contrary, a trial court may only entertain communications from the jury in open court after counsel have been notified, so that the parties are apprised of any such communication and may timely object to any irregular action by the court or the jury. (*People v. Avila* (2006) 38 Cal.4th 491, 613.) Section 1138 provides: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called." It is "critically important that a defendant and his attorney be permitted to participate in decisions as to what testimony is to be reread to the jury"; not to do so would tend to "deprive the defendant of his fundamental constitutional right to

the assistance of counsel at this critical stage of the proceedings." (*People v. Knighten* (1980) 105 Cal.App.3d 128, 132.) Because any such error implicates a fundamental federal constitutional right, a reviewing court must reverse unless the error is harmless beyond a reasonable doubt. (*Id.* at p. 133.) If a defendant is denied assistance of counsel during jury deliberations in this manner, "prejudice will be presumed if the denial may have affected the substantial rights of the accused. Only the most compelling showing to the contrary will overcome the presumption." (*Ibid.*)

Although the record is not without some ambiguity, it appears that counsel was notified that the jury requested readback, was informed of the jury's questions, and did stipulate that the reporter could read testimony to the jury in her absence. Whether counsel impliedly agreed that the court could, without conferring with counsel, select what if any testimony should be read and, in the absence of counsel, inform the jury of the court's conclusion that no such testimony existed, is less clear. But even assuming that the trial court erred in the procedure it followed, sufficiently compelling evidence overcomes the presumption of prejudicial harm. (See *People v. Stewart* (1983) 145 Cal.App.3d 967, 973-974.)

Rios' arguments are predicated primarily upon alleged ambiguities in the jury's readback requests that his counsel claimed she could have helped to clarify. We, however, find no ambiguities in the jury's questions. In any case, the transcript contains no responsive testimony regarding the first request, and only very limited testimony that favored the prosecution regarding the second request.

The first jury request specifically asked to "review testimony as to how [Rios'] car was selected by police to present to witnesses." Rios points to no testimony regarding how the car was selected by police to present to witnesses. Further, we perceive no prejudice from the trial court answering the jury's clear, straightforward question by informing the jury, correctly, that no such testimony existed. Rios contends that if his counsel had been present, she could have

clarified ambiguities in the jury's questions and "explained that she believed the jury wanted to know how the police decided to show the car to witnesses, that is what picture or view of the car the police decided to show to the witnesses," and that "she believed the jury also wanted to know who showed the witnesses the picture of the car." But there is no basis for interpreting the jury's unambiguous question in that manner. The jury asked for how the car was selected for presentation, not how it was presented, and their request showed no interest or uncertainty as to who did the presenting.[3] (See *People v. Neufer* (1994) 30 Cal.App.4th 244, 252 [rejecting appellant's speculation as to what trial court did not say, but might have, had defense counsel been present and noting that the trial court's purpose is not to second-guess what the jury should focus on].)

The jury's other request was similarly straightforward, specifically asking to "review testimony that makes any reference to how many different cars (if more than one) may have been presented to witnesses for identification." Rather than no testimony on this matter, as the trial court told the jury, there is *almost* no such testimony in the record—only brief references in the testimony of Ray and Lonnie indicating that each had been shown photographs of more than one car to choose from in identifying the car they saw at the crime scene. Thus, in response to defense counsel's question whether Detective Morales had shown him any cars other than Rios' green Acura for identification, Ray said yes. Counsel asked, "What other types of cars did he show you?" Ray answered, "I don't know the cars." Asked, "[W]ere there other green cars?" he said, "I don't know." The following colloquy took place on redirect examination of Lonnie: "Did the police .

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[3] The only basis Rios offers for a belief that the jury might have felt uncertain and wanted to be reminded as to who did the presenting comes from Rios' new trial motion, in which counsel merely stated that jurors had told her they *might* have reached a different verdict had they been reminded that it was Detective Morales who showed the pictures of cars to the various witnesses. No juror affidavits support this claim, which appears to have been based on defense counsel's misunderstanding that the juror's questions asked, "[W]ho showed the photographs of [Rios'] car to the victims?" rather than how police selected the car for presentation to witnesses and whether witnesses were shown photographs of more than one car.

. . ask you to look at a photograph of cars? [¶] Yes, they did. [¶] And did you look at a series of cars? [¶] On the computer, yes, I did. [¶] And did you select any types of cars? [¶] I saw a couple of cars that look like it could have been but I did state to the officers I was not sure."

The court's apparently inadvertent denial of readback of these brief snippets of testimony did not prejudice Rios. Ray's hesitant testimony stating that he did not know what other types of cars were shown, or whether any others were green, was neutral and did not favor the prosecution or the defense, but his unhesitant statement that the police had shown him multiple cars supported an inference that the police were not unfairly singling out Rios for prosecution. This strengthened the credibility of his identification of Rios' car and favored the prosecution. Thus readback of Ray's testimony would have hurt rather than helped Rios' case.

Lonnie's testimony that he was shown multiple cars and that some of them looked like the car in the shooting similarly favors the prosecution by indicating that the police conducted a legitimate identification process. Likewise, his expression of uncertainty about the cars—that some looked like possibilities, and he was not sure—indicated that he was not perfectly certain what car he had seen and thus tended to undercut his claim to certainty that the car he saw definitely was not Rios' car.

Moreover, although Rios argues that the witnesses' uncertainty about the cars they had been shown would have helped his defense, the jury's request expressed no interest or uncertainty about that issue. Rios could not have been prejudiced by the trial court denying the jurors information they did not seek. Also, the trial court's brief statement to the jury that there was no six-pack of cars suggested that the police might have shown witnesses only pictures of Rios' car and no others, marginally helping rather than hurting the defense. (See *People v. Nunez* (1983) 144 Cal.App.3d 697, 702-703 [finding no prejudicial error where the transcript shows that any testimony read back was not detrimental to the appellant

or was uncontroverted].) Further, the evidence of guilt was very strong. Two eyewitnesses identified Rios as the driver both to police and at trial.

B

Rios contends that the trial court erred prejudicially in overruling his hearsay objection to Morales' testimony that the Cal Gang printout contained information that Rios had admitted gang membership to other officers. Further, in a related argument, he contends that the trial court erred by refusing to instruct the jury on CALJIC No. 2.28.

Assuming that the trial court erred both in overruling the hearsay objection and in not giving CALJIC No. 2.28 to the jury, we find no prejudice to Rios. "The erroneous admission of gang or other evidence requires reversal only if it is reasonably probable that appellant would have obtained a more favorable result had the evidence been excluded." (*People v. Avitia* (2005) 127 Cal.App.4th 185, 194; see also Evid. Code, § 353, subd. (b).) The prosecution properly qualified Detective Morales as a gang expert, and "a properly qualified gang expert may, where appropriate, testify to a wide variety of matters[.]" (*People v. Avitia*, *supra*, 127 Cal.App.4th at p. 192.) Moreover, one need not be a gang member or associate to commit an act for the benefit of, in association with, or at the direction of a street gang under section 186.22, subdivision (b). (See *People v. Valdez* (1997) 58 Cal.App.4th 494, 505.) Given the evidence of Rios' association with the Westside Longos gang and its members, his driving the very car from which Westside Longos signs were exhibited during the instant drive-by shooting, his car's connection with another drive-by shooting also involving Westside Longos slogans, his attempt to escape police when they observed him at a Westside Longos' house, the items found in his garage when he was arrested, and Detective Morales' expert testimony regarding the significance of this evidence, we do not find it reasonably probable that Rios would have obtained a more favorable outcome had his hearsay objection been sustained.

Regarding the prosecutor's delay in providing the Cal Gang printout, CALJIC No. 2.28 provides that if jurors find that the prosecution's concealment or delayed disclosure of evidence relates to an important fact "and does not relate to subject matter already established by other credible evidence," jurors may consider that concealment or delay in determining the weight or believability of the evidence. The fact at issue—whether Rios is a gang member—relates to a matter already established by other credible evidence—Rios' association with a gang and his participation in acts for the gang's benefit. Instructional error in relation to CALJIC No. 2.28 is reviewed for harmless error and whether it is reasonably probable that the defendant would have received a more favorable result without the error. (*People v. Lawson* (2005) 131 Cal.App.4th 1242, 1249, fn. 7; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Because the evidence of Rios' association with the Westside Longos and his participation in criminal acts for their benefit is overwhelming, we find no reasonable probability that Rios would have received a better outcome had the trial court instructed the jury on CALJIC No. 2.28.

C

Rios maintains that the evidence is insufficient to support his conviction of violating section 246. He contends that section 246 requires that the shot must actually hit the dwelling or building, and he argues that the shots fired in front of the El Capitan did not. We disagree.

Section 246 applies to "[a]ny person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house, occupied building," or occupied vehicle. The statute does not require an intent to hit the house or building that was shot at. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 432-433.) The statute also does not require that the building shot at must be hit. (See *People v. Overman* (2005) 126 Cal.App.4th 1344, 1353, 1362 [substantial evidence supported section 246 instruction even where no evidence building was hit].) "[S]ection 246 is not limited to the act of shooting directly 'at' an inhabited or

occupied target. Rather, the act of shooting 'at' a proscribed target is also committed when the defendant shoots in such close proximity to the target that he shows a conscious indifference to the probable consequence that one or more bullets will strike the target or persons in or around it. The defendant's conscious indifference to the probability that a shooting will achieve a particular result is inferred from the nature and circumstances of his act." (*Id*. at pp. 1356-1357, fn. omitted.)

We find instructive *People v. Chavira* (1970) 3 Cal.App.3d 988. In *Chavira*, the defendant and his associates fired several shots at persons "congregated in front of, and on the driveway leading to" an inhabited dwelling. (*Id*. at p. 993.) The defendant argued that the evidence was insufficient to support his section 246 conviction because he did not fire directly at the dwelling, but only at the persons gathered outside of it. (*Id*. at p. 992.) The court held that where the shooters fired a "fusillade of shots directed primarily at persons standing close to a dwelling," the jury was "entitled to conclude that [the defendants] were aware of the probability that some shots would hit the building and that they were consciously indifferent to that result" and thus had an intent sufficient to satisfy section 246. (*Id*. at p. 993.)

Rios urges us to distinguish *Chavira* and various other authorities on the ground that in those cases, the dwelling or building actually was hit. He also encourages us to disregard *Overman*. We decline both invitations. In this case, Rios and his companions fired several shots at persons standing outside a condominium complex comprised of multiple inhabited dwellings in at least one occupied building. The record indicates that the security gate is a gate for pedestrians, not for vehicles, and that a building that is part of the complex is

either behind the security gate or includes the security gate.[4] The gate was closing, but not all the way closed, as the shots were fired, and some of the shots penetrated the gate. Thus the jury appropriately could find that Rios and his associates showed a conscious indifference to the probable consequence that one or more bullets would strike whatever was behind the gate, including the building or buildings that comprise the El Capitan.[5] (See *People v. Chavira*, *supra*, 3 Cal.App.3d at p. 993.)

D

Finally, Rios contends that the trial court erred in finding that he violated section 12022, subdivision (a)(1), because being armed with a firearm was an element of the other shooting-related offenses of which he was convicted. He is correct on that point, as the Attorney General concedes. The statute requires an additional one-year term to be imposed on any felon who was armed with a firearm during the commission of a felony, "unless the arming is an element of the offense of which he . . . was convicted." (§ 12022, subd. (a)(1).) Being thus armed is necessarily an element of both assault with a semiautomatic firearm and shooting at an occupied building or inhabited dwelling. Accordingly, Rios may not be sentenced to an additional term pursuant to section 12022. (See *People v. Smith* (1985) 163 Cal.App.3d 908, 912-913; *People v. Bryan* (1970) 3 Cal.App.3d 327, 343.)

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**4** Martin, in testimony, referred to the security gate as a "door" and stated that the group that had been in front of the El Capitan closed the "door" and "was running back into the building" when the shots were fired. Trial exhibits indicate that the gate is built into a building.

**5** We further note that because the security gate was apparently part of the front building of the El Capitan, in shooting at and hitting the gate, the shooter also shot at and hit an occupied building into which Martin, Ray, and others had fled.

DISPOSITION

The judgment is modified to strike the sentence enhancement under section 12022, subdivision (a)(1). As modified, the judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment and forward a certified copy thereof to the Department of Corrections.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

VOGEL, Acting P. J.

JACKSON, J.*

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* (Judge of the L. A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)